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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Crafty Productions, Inc., a California corporation, and **Crafty Productions, LLC**, a California company,

Plaintiffs,

v.

Fuqing Sanxing Crafts Co. Ltd., a China company, **Tony Zhu**, an individual, **Michelle Faherty d/b/a MRF Associates**, an individual, **The Michaels Companies, Inc.**, a Delaware corporation, **Michaels Stores, Inc.**, a Delaware corporation, **Plaid Enterprises, Inc.**, a Georgia corporation, **Hobby Lobby Stores, Inc.**, an Oklahoma corporation, **Sbars, Inc.**, a New Jersey corporation, **A.C. Moore Arts & Crafts, Inc.**, a New Jersey corporation, **99 Cents Only Stores LLC**, a California company, **Dollar Tree Stores, Inc.**, a Virginia corporation, **Jo-Ann Stores, LLC**, an Ohio company, **Party City Holdings, Inc.**, a Delaware corporation, **Party City Corporation**, a Delaware corporation, **ZheJiang HongYe Co. Ltd.**, a China company, **Fuzhou Bomy Trading Co., Ltd.**, a China company, **Fuzhou Great Suns Co. Ltd.**, a China company, **Sunface Crafts Co. Ltd.**, a China company,

Defendants.

Case No. 3:15-cv-00719-BAS-JLB

PLAINIFFS' OPPOSITION TO RULE 12(b)(2) MOTION TO DISMISS BY DEFENDANTS A.C. MOORE AND SBARS

(ECF Dkt. Nos. 103-104)

Date: November 23, 2015
Ctrm: 4B

Honorable Cynthia Bashant

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Introduction and Factual Background[1]

As Plaintiffs set forth in detail in their Complaint and First Amended Complaint, this case is about a local San Diego company—Plaintiff Crafty Productions, Inc. ("CPI")—who created many of the "crafty" products sold to American consumers in a successful segment of the crafts market. CPI essentially pioneered this particular segment of the market over a decade ago. For many years thereafter, CPI had its crafty creations manufactured in China, and CPI sold them to the large crafts retailers in the United States. Several years ago, however, in an effort to cut costs and increase profits on both ends, the manufacturers in China and the large U.S. retailers got together directly, diverting business away from CPI while continuing to manufacture and sell—*en masse*—CPI's many original, creative designs. Because CPI is a small company, it remained ignorant until its sales dropped so precipitously it has now become barely viable. In their move toward "going factory direct," as it is called, everyone intentionally ignored CPI's intellectual property rights, which is the wrong this action was brought to make right. *See generally* ECF No. 72 (First Amended Complaint).

Defendants A.C. Moore and Sbars are two of the many "two-timing" U.S. retailers. Plaintiffs' detailed allegations include the following, for example:

> Bill Maisch, a buyer for A.C. Moore, stated that he did not want to buy products from [Defendant] Faherty because they were CPI's original products, but eventually Faherty's prices were so low that he would not be making a good business decision if he didn't buy them from Faherty. Maisch also stated that Faherty's products were being made by CPI's factory in China, which is [Defendant] Zhu's factory.

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[1] Plaintiffs recognize this Court's mandate, from Paragraph D of the Standing Order, that "[i]f multiple parties are moving for substantially the same relief or opposing a motion seeking substantially the same relief sought against them, and noticed for the same hearing date, counsel shall make every effort to coordinate and consolidate the briefing . . . ." Plaintiffs have attempted to consolidate their opposition papers addressing similar issues and/or responding to the motions from particular parties, which were filed without a reciprocal effort at consolidation.

. . .

> Faherty was selling CPI's knocked off products to Sbars and having them made at the Hongye factory as shown on the back of the product as well as selling CPI's knocked off products to A.C. Moore and having them manufactured at CPI's same factory.

ECF No. 72 at 12-13. These allegations substantiate the knowledge and intention of A.C. Moore and Sbars that their infringing products would harm Plaintiffs, here in San Diego, and that they could expect to be sued here.

In their motions, these Defendants assert a lack of personal jurisdiction under Rule 12(b)(2), and improper venue (based on a lack of personal jurisdiction) under Rule 12(b)(3). A.C. Moore asserts that it "does not own or operate any stores in California," and that its website <acmoore.com> is "interactive" yet "passive" and "does not sell merchandise." *See* ECF No. 103-2 at 2-3. Similarly, Sbars asserts that it "acts as a distributor of merchandise, primarily to independent retailers," and that its website <sbarsonline.com> is "directed toward retailers, not individual consumers." *See* ECF No. 104-2 at 2. However, each of these Defendants conducts a large, nationwide business. A.C. Moore and Sbars both have annual sales in the hundreds of millions. *See* Lobbin Decl. ¶ 7, Ex. 8.[2] And through online stores, both A.C. Moore and Sbars sell products to California customers via <acmoore.com> and <sbarsonline.com>, respectively. *See* Mello Decl. ¶ 9, Exs. 4-5. Therefore, this Court indeed should maintain personal jurisdiction, or at the very least, allow for jurisdictional discovery to confirm that exercising personal jurisdiction over these Defendants is justified.[3]

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[2] All exhibits referenced herein are submitted with the Declarations of Stephen M. Lobbin (Exhibits 6-8) and Paula Mello (Exhibits 1-5) filed herewith.

[3] "If the district court concludes that the existing record is insufficient to support personal jurisdiction . . . [jurisdictional] discovery is appropriate where the existing record is inadequate to support personal jurisdiction and a party demonstrates that it can supplement its jurisdictional allegations through discovery." *Trintec Indus., Inc.*

Legal Standards

As this Court summarized recently:

> Where the [personal jurisdiction] motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make "a *prima facie* showing of jurisdictional facts to withstand the motion to dismiss." *Bryton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981, 985 (9th Cir. 2009). "In determining whether the plaintiff has met this burden, the Court must take the allegations in the plaintiff's complaint as true and resolve the disputed jurisdictional facts in the plaintiff's favor." *Nissan Motor Co., Ltd. v. Nissan Computer Corp.*, 89 F. Supp. 2d 1154, 1158 (C.D. Cal. 2000) (citing *Ziegler v. Indian River Cnty.*, 64 F.3d 470, 473 (9th Cir. 1995)). A *prima facie* showing means that the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.
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> . . .
>
> General jurisdiction "enables a court to hear cases unrelated to the defendant's forum activities[.]" *Fields v. Sedgewick Assoc. Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986). Specific jurisdiction allows the court to exercise jurisdiction over a defendant whose forum-related activities gave rise to the action before the court. *See Bancroft & Masters, Inc. v. August Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

Ocean SW, Inc. v. CanAm Pet Treats, Inc., 2015 WL 2180492, at *3 (S.D. Cal. May 7, 2015) (Bashant, J.) (certain internal quotations and citations omitted).

As an example of sufficient general jurisdiction, this Court discussed *Gator.Com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072 (9th Cir. 2003), where the defendant (a) marketed products in California, (b) sold products in California, (c) had "extensive contacts with California vendors," and (d) operated a website that "is clearly and deliberately structured to operate as a sophisticated virtual store in

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v. Pedre Promotional Prods., Inc., 395 F.3d 1275, 1283 (Fed. Cir. 2005) (quotation and citation omitted). Because neither A.C. Moore nor Sbars has informed the Court about the extent of their sales into California (including but not limited to products in like CPI's), with such discovery, Plaintiffs believe they can supplement their jurisdictional allegations.

California." *Ocean SW* at *5 (citing *Gator.Com*, 341 F.3d at 1078). Explaining further:

> Though the defendant in Gator.Com lacked the traditional bases for general jurisdiction . . . [and] [d]espite the fact that the defendant did not pay taxes or maintain an agent for the service of process in California, and its California sales amounted to 6 percent of the company's revenue, the factors favoring general jurisdiction included: selling "millions of dollars' worth of products" in California; soliciting California residents directly through email; purchasing products from "numerous California vendors"; maintaining a "highly interactive" website through which California consumers made purchases and communicated with sales representatives; and conducting "national print and broadcasting marketing efforts" that encompassed California.

Ocean SW at *5 (citing *Gator.Com*, 341 F.3d at 1074, 1078).

Specific jurisdiction is satisfied—under the Ninth Circuit's three-part test—where (1) the defendant purposefully availed itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (2) the cause of action arose out of the defendant's forum-related activities; and (3) the exercise of jurisdiction is reasonable. *See id.* at *6 (citing *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1072 (9th Cir. 2001)). "If the plaintiff succeeds in satisfying [] the first two prongs, the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Id.* (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)). In cases involving contracts, "a court should look at four factors: (1) prior negotiations; (2) contemplated future consequences; (3) the terms of the contract; and (4) the parties' actual course of dealings . . . [and] a defendant must have 'performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.'" *Id.* at *7 (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008)) (certain internal citations omitted).

Argument

Concerning general jurisdiction, given the size of these companies, the fact that both A.C. Moore and Sbars have an online presence offering to sell products to California customers should satisfy Plaintiffs' *prima facie* burden on jurisdiction.[4] Certainly, depending on the quantity and extent of their sales into California, and given the fact that the alleged copyright and trade dress infringement (and other claims alleged) by these Defendants precipitated a substantial impact on Plaintiffs here in San Diego, specific jurisdiction also is satisfied. For example, as the Ninth Circuit has distinguished:

> [W]e have held that operating even a passive website in conjunction with 'something more'—conduct directly targeting the forum—is sufficient. In determining whether a nonresident defendant has done 'something more,' we have considered several factors, including the interactivity of the defendant's website, the geographic scope of the defendant's commercial ambitions, and whether the defendant 'individually targeted' a plaintiff known to be a forum resident.

Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1229 (9th Cir. 2011) (internal citations omitted).

Here, both A.C. Moore and Sbars operate active, not passive, websites that offer to sell products continuously to California residents. The "something more" includes: (a) both A.C. Moore and Sbars are big companies, big players in the market segment at issue, and have national and international ambitions, and (b) the allegations in this action make clear that these Defendants knew that their alleged infringing actions would have a targeted impact on Plaintiffs in this forum, and therefore it was completely foreseeable that they would be haled into this Court. As noted above, this Court "must take the allegations in the plaintiff's complaint as true and resolve the disputed jurisdictional facts in the plaintiff's favor." This standard is especially important here, because in their declarations, these Defendants imply that they sell no products into California, without actually stating what their California sales are, in which product categories.

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[4] Plaintiffs' *prima facie* burden is to "only demonstrate facts that if true would support jurisdiction over the defendant." *See supra*. If this Court is inclined to grant the motion, however, Plaintiffs request that they first be permitted appropriate jurisdictional discovery, particularly in order to confirm the extent of sales to California customers by Defendants A.C. Moore and Sbars.

Moreover, this Court's exercise of personal jurisdiction over these Defendants indeed would be entirely reasonable, primarily because these Defendants are large companies whose alleged acts caused harm here in San Diego, and they would suffer no undue burden litigating here. Additionally, keeping this action together as one action would promote the efficient judicial resolution of the controversy, rather than requiring a separate action by Plaintiffs in a far-away forum.

Finally, the venue issue is subsumed within the personal jurisdiction issue; that is, if this Court confirms personal jurisdiction, then venue also is appropriate.

Conclusion

For each of the foregoing reasons, Plaintiffs respectfully submit that the motion should be denied.

Respectfully submitted,

Dated: November 9, 2015

ONE LLP

By: /s/ Stephen M. Lobbin

Attorneys for Plaintiff **Crafty Productions, Inc.** and **Crafty Productions, LLC**

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2015, I electronically transmitted the foregoing document using the CM/ECF system for filing, which will transmit the document electronically to all registered participants as identified on the Notice of Electronic Filing, and paper copies have been served on those indicated as non-registered participants.

/s/ Stephen M. Lobbin